



Appeal number: EA/2020/0087/V

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

STEFANIA MAURIZI

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

-and -

**THE COMMISSIONER OF THE POLICE FOR THE
METROPOLIS**

**Second
Respondent**

Before:

**JUDGE MOIRA MACMILLAN
MS ANNE CHAFER**

Sitting in public on 8 & 9 July 2021

Sitting in private on 8 July 2021

Appearances:

Ms Estelle Dehon QC & Ms Jennifer Robinson for the Appellant

Mr Robin Hopkins for the First Respondent

Mr Christopher Knight for the Second Respondent

DECISION

1. The appeal is dismissed.

2. Decision Notice dated 27 January 2020 is amended to the extent that the withheld information is exempt from disclosure on the basis of s. 23(1) of the Freedom of Information Act 2000 alone.

REASONS

Mode of hearing

3. The open hearing was convened remotely by CVP on 8 & 9 July 2021. All parties joined that part of the hearing remotely. The Tribunal was satisfied that this constituted an open hearing in public within the meaning of rule 35A (3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

4. The closed hearing took place in person at Field House, London on the afternoon of 8 July 2021 with only the Respondents in attendance. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

5. This appeal has been decided by a Salaried Judge, sitting with one other member. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6 (a) of the Senior President's Pilot Practice Direction dated 19 March 2020¹ and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the pandemic.

6. Unfortunately, since that date, other professional obligations have caused undue delay to this Decision being promulgated, for which I can only apologise.

7. The panel considered agreed electronic bundles consisting of:

- (a) An open bundle of evidence comprising pages 1 to 188.
- (b) A closed bundle comprising pages 1 to 28.
- (c) A bundle of authorities comprising pages 1 to 880.

8. We have also had the assistance of detailed oral and written submissions from all parties, for which we are grateful.

Background to Appeal

9. Ms Maurizi is an investigative journalist who, at the relevant date, was working for an Italian newspaper. On 29 June 2017 she made a request under s. 1 of the Freedom of Information Act 2000 ('FOIA') addressed to the Second Respondent ('the MPS'). The information requested was:

¹ <https://www.judiciary.uk/publications/pilot-practice-direction-panel-composition-in-the-first-tier-tribunal-and-the-upper-tribunal/>

“a copy of the correspondence between the US DOJ and the Met Police on [JF, SH, KH] from June 2013 to June 2017”.

10. In a covering email, Ms Maurizi described JF, SH and KH as members of staff of WikiLeaks. SH no longer works for WikiLeaks. A gate It is not in dispute that these three individuals are journalists. This was Ms Maurizi’s second request to the MPS for information relating to these three people.

11. The MPS responded to Ms Maurizi’s request, refusing to confirm or deny whether the information was held in reliance on s. 40(5)(b)(i) FOIA, which is an exemption relating to personal data. That response was upheld by the Information Commissioner but overturned by the First-tier Tribunal in appeal reference EA/2018/0071. The Tribunal ordered the MPS to confirm or deny whether the requested information was held and to issue a fresh response to Ms Maurizi’s request.

12. The MPS issued a second response to Ms Maurizi on 30 January 2019. This confirmed that information within the scope of the request was held but again refused her request, this time in reliance on s. 23(1) and 24(1) in the alternative, s. 27(1)(a) and s. 31(1)(a) & (b).

13. Ms Maurizi applied to the Information Commissioner for a second time for a decision under s. 50 FOIA. The Information Commissioner issued a Decision Notice on 27 January 2020 which upheld the MPS reliance on s. 23(1) and s.24(1) in the alternative. This is the Decision Notice under appeal. In accordance with his usual practice and with the Upper Tribunal’s decision in *Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC)*, the Commissioner did not go on to consider the application of any of the other exemptions relied upon.

Law

14. The obligation of a public authority to disclose requested information, if held, is contained in s. 1(1)(b) FOIA. Part II FOIA sets out a number of exemptions to the obligation, some of which are subject to a public interest balancing exercise, which is set out in s. 2(2)(b) and is whether *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

15. S. 2(3) specifies that a small number of exemptions are absolute, and therefore not subject to the public interest balancing test. S. 23 is an absolute exemption by virtue of s. 2(3)(b). So far as relevant, s. 23 provides as follows:

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

- (a) the Security Service,*
- (b) the Secret Intelligence Service,*
- (c) the Government Communications Headquarters,*
- (d) the special forces,*
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,*
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,*
- (g) the Tribunal established under section 5 of the Security Service Act 1989,*
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,*
- (i) the Security Vetting Appeals Panel,*
- (j) the Security Commission,*
- (k) [repealed]*
- (l) the Service Authority for the National Criminal Intelligence Service,*
- (m) the Serious Organised Crime Agency,*
- (n) the National Crime Agency,*
- (o) the Intelligence and Security Committee of Parliament.*

16. In *Commissioner of the Police of the Metropolis v 1. Information Commissioner, 2. Martin Rosenbaum [2021] UKUT 5 (AAC)* the Upper Tribunal provided guidance on the approach to be followed when deciding whether information ‘relates to’ a s. 23(3) body. At paragraph 43 UTJ Markus approved 14 principles identified by Mr Knight – on that occasion representing the Information Commissioner – derived from a number of earlier Upper Tribunal decisions. These principles are considered further below.

17. The other exemptions relied upon by the MPS are qualified rather than absolute exemptions and are therefore subject to the s. 2(2)(b) public interest balancing test.

18. S. 24 is an additional exemption for national security information. S. 24(1) provides that:

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

19. S. 27 provides an exemption for information which, if published, is likely to prejudice UK international relations. So far as it is relied upon it provides as follows:

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

...

(5) In this section—

“State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

20. Finally, s. 31(1)(a) & (b) provide an exemption for information where publication is likely to prejudice law enforcement interests:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

21. S. 57 provides a right of appeal to the Tribunal against a s.50 Decision Notice. The Tribunal's powers are set out in s. 58:

If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Open evidence

22. Ms Maurizi has provided a second witness statement for the purposes of her current appeal. This sets out her background as an investigative journalist, her professional relationship with WikiLeaks and her investigation as a journalist of the US authorities' criminal investigation of JF, SH, KH. Ms Maurizi also sets out her views on the public interest in exposing 'UK-US efforts to target neutralise the journalism practiced by WikiLeaks, including efforts to investigate WikiLeaks journalists and staff'. She refers to a background of interference with journalistic rights in the context of Julian Assange's contested extradition to the US and raises concerns about the use of UK counter-terrorism policing powers in this context.

23. KH, SH and JF have also provided witness statements, setting out their support for the publication of the information requested by Ms Maurizi. They express similar concerns about an apparent use of counter-terrorism policing powers to investigate and curtail the activities of investigative journalists and, in addition, support the submissions made by the NUJ.

24. All of the evidence relied on by Ms Maurizi highlights the role of journalism in a free and democratic society and, by extension, the importance of ensuring the security of sources relied upon by investigative journalists.

25. The MPS relies mainly on the evidence of Detective Chief Superintendent Kevin Southworth. He has been the officer in charge of SO15's Counter Terrorism Command ('CTC') intelligence centre since July 2018 and was previously deployed elsewhere in counter terrorism policing. His statement sets out four broad arguments in support of the MPS position:

i. He describes CTC as a significant intelligence partner to the Security Service, with constant, daily liaison between the two organisations. He also describes well established working relationships between CTC and s. 23 bodies more generally, such that any information gathered or held by CTC is either liable to be exchanged with, or to originate from, a S. 23 body.

ii. He also states that CTC exchanges information and intelligence with international partners in support of shared objectives. In his view, these relationships risk being severely damaged if the nature of exchanges with CTC are made public, since this would compromise an assumption of confidentiality on both sides. There is an additional risk of compromising covert techniques used by international partners to gather information.

iii. DCS Southworth also describes the risk of harm to CTC's operational effectiveness due to the 'mosaic effect'. This term describes the risk that a number of pieces of publicly available information may be put together in order to build a picture of, for example, which groups or individuals are the subject of police investigation and how information relating to them is being gathered.

iv. Finally, DCS Southworth cites the risk inherent in the publication of information about CTC activities, which has the effect of confirming otherwise unverified or speculative information, thereby allowing persons of interest to take remedial action.

26. DCS Southworth expanded on his statement in oral evidence. He accepted in cross-examination that the security bodies listed in s. 23(3) do not include either CTC or any foreign agencies. He also accepted that not all information held by CTC would relate to a s. 23 body but was of the opinion that, due to the extent to which CTC is integrated with the Security Service, it is almost a reasonable assumption to say that CTC would be unable to disaggregate any intelligence it held. In this case, having viewed the material, he is satisfied that the s. 23 exemption applies, and states that it does so on the basis that the information relates to, rather than originates from, a s. 23 body.

27. He described CTC as sometimes acting as a natural interlocutor for a s.23 body. He also described a universal presumption that interactions between s. 23 bodies and overseas counterparts would take place in a 'safe space,' in relation to which there is an expectation of

absolute confidentiality. A failure to maintain this could prejudice the relationship, leading to a reluctance to share information with CTC in the future. In the context of the withheld information, his view was that the relationship with US counterparts would be damaged if they believed CTC would be compelled to disclose information. However, this damage would not meet the threshold of requiring a diplomatic response.

28. DCS Southworth acknowledged the important role that investigative journalism plays in supporting democratic freedom and openness and cited the investigation of the Panama Papers as a good example of this. However, in his view, on some occasions the behaviour of journalists might undermine national security, thereby posing a risk to others. In such circumstances journalistic privilege and the protection of sources could not to be afforded an absolute status. DCS Southworth also accepted that freedom of expression was a relevant, important public interest, both when police officers consider whether to investigate a journalist and when they consider a request from another state for assistance with such an investigation. He explained that a police officer making such a decision would keep a decision log, and that the decisions taken would accord with the police Code of Ethics which recognises the importance of protecting journalistic freedom. He accepted that a known, human-rights based criticism of an investigation carried out by another state would also be a relevant factor, were a request to be made by that state for assistance.

Closed evidence

29. We were able to consider the withheld material and had the benefit of seeing an unredacted copy of DCS Southworth's statement. We also held a closed hearing, during which Mr Hopkins asked DCS Southworth a number of additional cross-examination questions on Ms Dehon's behalf.

30. Following the closed hearing, Ms Dehon was provided with the following gist:

Counsel for the ICO asked DCS Southworth all of the questions on Ms Dehon's list, supplemented by questions of his own that he indicated he thought the Appellant would ask if she were present in the closed hearing.

DCS Southworth's answers adopted the same position as given in open in answer to those questions. His answers included:

... that NCND on a section 23/section 24 basis could and possibly should have been relied upon when the request was first responded to. The decision not to do so did not detract from the substantive concerns with disclosure.

... how disclosure of these documents would be harmful on a specific level and on a strategic level (i.e. in terms of harm between foreign and domestic security bodies working in partnership).

In his view, the age of these documents did not in any way diminish the risk of harm.

Publicly available information about US-UK policing and security cooperation, such as in respect of Julian Assange, did not diminish the risk of harm in this case. This was partly because official confirmation is different to inferences, and partly because the matters revealed by these specific documents were not publicly known.

Mosaic concerns arise because what would be disclosed here would be compared with, i.e. pieced together or contrasted with, what was disclosed or withheld or subject to NCND in other cases to draw inferences about investigations, who was and was not the subject of investigations, and about policing methods.

DCS Southworth gave an example from his own experience about harm caused by leaks of sensitive information, including its effect on cooperation with US law enforcement partners.

DCS Southworth said that in principle it was relevant to consider whether an investigation was unfounded, including where journalists were involved. This could affect decisions about how much transparency was appropriate, but in his view this did not arise here.

There was discussion of whether and to what extent any RIPA-related issues arose.

DCS Southworth cited specific examples from the withheld information of information that would be likely to reveal operational matters, both as regards the MPS and others.

DCS Southworth explained why those specific examples could not be redacted in a way that would remove the concerns with disclosure.

In answer to questions from the Tribunal, DCS Southworth explained why he considered s. 23 to apply to all the withheld information. He also explained that his concern about prejudice to security and policing operations applied in respect of both UK domestic security and policing, as well as international co-operation on those issues.

Counsel for the MPS made submissions on the application of the law to the information in issue, by reference to all four exemptions claimed. Some reference to authority was made by way of analogy – reference to the relevant paragraphs will be repeated in open submissions.

Counsel for the ICO agreed with the MPS on the application of s. 23 and, in the alternative, s. 24. The ICO made no submissions on the application of ss. 27 or 31.

Submissions

31. In relation to the s. 23 exemption Ms Dehon, on behalf of Ms Maurizi, submits that none of the bodies named in the information request are listed in s. 23(3), although CTC and its predecessor organisations could have been as they were well known to Parliament. She argues that it would be wrong to conclude that information ‘relates to’ a s. 23 body merely because CTC’s remit may mirror that of a s. 23 body and she invites the Tribunal to make a finding that specifically rejects such a blanket approach. Similarly, the possible future interest of a s. 23 body in information is insufficient for the purposes of deciding whether the information ‘relates to’ that body. DCS Southworth’s evidence, particularly in relation to a presumption against disaggregation, should be considered by the Tribunal against the principles identified by the Upper Tribunal in Rosenbaum.

32. In relation to the other exemptions, Ms Dehon draws a distinction between information that must be withheld in order to safeguard national security, and information relating to journalists who are reporting on national security issues. She cites persuasive authorities, including *Kennedy v Information Commissioner [2015] AC 455*, in support of the proposition that journalists occupy an important public watchdog position and must be allowed to operate, including in the area of national security reporting, as an integral part of the mechanism that secures freedom of expression for the wider community. She also cites a number of authorities relating to the need to carry out a careful balancing exercise when restricting article 10 rights.

33. Ms Dehon submits that the lack of reasons put forward by the MPS in relation to the national security exemptions put Ms Maurizi at a significant disadvantage in these proceedings. She notes with concern DCS Southworth's oral evidence which appeared to associate information about journalists with terrorist/extremist attacks and with the use of counter-terrorism powers. She also highlights the serious criticism by the UCLA of the US investigation to which Ms Maurizi's information request relates.

34. The National Union of Journalists ('NUJ') has provided written submissions in support of Ms Maurizi. These confirm that SH and JF are NUJ members and that KH and Ms Maurizi are members of sister unions of journalists. The NUJ expresses serious concern about a reliance on laws designed for national security purposes in the context of information about journalists. It cites recent examples of state investigation of journalists, in particular of journalists who are known to report on state misconduct and human rights concerns and explains why this poses a risk to the important watchdog role of journalists.

35. Mr Knight, on behalf of the MPS, agrees that the Tribunal must consider the *Rosenbaum* principles when determining whether the s. 23 exemption applies to the withheld information. He draws particular attention to the 10th principle, namely that the degree to which information may relate to a s. 23 body may be informed by the context of the information. He also invites the Tribunal to consider paragraph 44 of *Rosenbaum*, in which UTJ Markus QC approved the approach of the FTT when drawing inferences as to whether information related to a s. 23 body by considering context and evidence. In the circumstances of that case the Tribunal had concluded on this basis that confirming or denying whether the MPS held information about an investigation would, in the context of a strategic working relationship, reveal the involvement of a s. 23 body.

36. At an earlier stage in these proceedings the MPS's case in relation to the application of s. 23 and s. 24 in the alternative was based on Information Commissioner's guidance, which endorsed such an approach where reliance on s. 24 was referred to solely as a means of obscuring a connection between a s. 23 body and an information request. That approach was rejected by the FTT in *Williams and Ors v Information Commissioner and FCDO*, although the FTT decision was subsequently set aside by the Upper Tribunal in *GIA/388/389/390/2021*. However, in these proceedings the MPS now relies on s. 23 and s. 24 in the alternative in the more traditional sense. Therefore, Mr Knight's position now is that, should the Tribunal conclude the withheld information is not caught by s. 23(1) then, in the alternative, the s. 24(1) exemption must apply.

37. In relation to the wider s. 24 national security interests, Mr Knight relies on Lord Sumption's observations at paragraph 32 of *R (Lord Carlisle) v Home Secretary [2014] UKSC 60* in respect of the evidential weight that should be given to expert judgement of the executive:

"...The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision maker or those who advise her..."

38. Mr Knight submits that DCS Southworth is a senior, experienced CTC officer. The Tribunal need not agree with everything he says but needs to respect his experience and views about the likely harms that could arise from the disclosure of the withheld information. In the context of s. 24, the test the Tribunal must apply is whether safeguarding is required for the purposes of national security. Mr Knight describes considerable overlap in the MPS case on the application of ss. 24, 27 and 31(1), and contends that crime in the latter context is not restricted to criminal acts in the UK and does not preclude the risk to future criminal proceedings.

39. Mr Hopkins, on behalf of the Information Commissioner, agrees that the Tribunal should adopt the *Rosenbaum* principles when considering whether the withheld information relates to a s. 23 body. In relation to the s. 24 alternative, he submits that the gist provided to Ms Maurizi sets out the types of harm that might result were the information to be publicly disclosed. These comprise risks of both investigation-specific harm and harm to CTC's relationship with strategic partners, both of which would arise in the context of national security concerns. In Mr Hopkins' view, DCS Southworth came up to proof in relation to these risks. He notes that neither Respondent has attempted to gainsay Ms Maurizi's submissions in relation to the importance of the public interest in protecting the rights of journalists. He contends however that the Tribunal's primary focus, in the context of this case, should be on national security interests

40. In response to Ms Maurizi's criticisms of the Decision Notice, Mr Hopkins notes that this was written at a stage where the MPS relied on s. 23 and s. 24 in the alternative in the less traditional sense, and was necessarily drafted with a view to masking whether a s. 23 body had an interest in the withheld material. This imposed an obvious limitation on the explanation that the Commissioner is able to provide in the Decision Notice, which he acknowledges is frustrating for information requesters. In any event, Mr Hopkins submits that any procedural defect in the Decision Notice will be remedied by the Tribunal's full merits review following an appeal.

Conclusions

41. Having considered these submissions and the withheld information, we conclude that the s. 23(1) exemption applies to all of the withheld material.

42. When reaching this conclusion, we have considered with care the guidance provided by the Upper Tribunal in *Rosenbaum*, in particular at paragraphs 35 & 43. We note:

- i. That the purpose of s. 23 is to preserve the operational secrecy necessary for s. 23(3) bodies to perform their functions, and that FOIA should not be used to obtain information from or about the activities of these bodies [*Rosenbaum* paragraph 35, principles 2 & 3].

- ii. That the protection of s. 23 extends to all information ‘touching on’ s. 23 bodies, even if it appears harmless or anodyne (*principles 4 & 5*).
- iii. That the term ‘relates to’ must be applied in a wide sense, and ought to be understood as including information with some connection to a s. 23 body or which is in a record supplied to one or more of the s. 23 bodies for the purpose of the discharge of statutory functions. However, the connection between the information and the s. 23 body must not be too remote (*principles 6, 8 & 9*).
- iv. That the assessment of the degree of the relationship between the information and the s. 23 body may be informed by the context of the information (*principle 10*); and
- v. That consideration must be given as to whether information can be disaggregated from the exempt information so as to render it non-exempt and still capable of being provided in an intelligible form (*principle 12*).

43. We find that the withheld information, when considered from the perspective of these principles, is clearly information that relates to a s. 23 body. We have reached this conclusion having considered both the content and the context of the information itself and having given appropriate weight to the closed written and oral evidence of DCS Southworth.

44. We have not concluded that the information relates to a s. 23 body merely because it is held by CTC. We agree with DCS Southworth’s statement, in oral evidence, that not all information held by CTC will necessarily pass the *Rosenbaum* test for deciding whether it ‘relates to’ a s. 23 body, notwithstanding the close working relationships that exists between CTC and s. 23 bodies. However, we are satisfied on the evidence before us that the withheld information in this case does pass that test. Our full reasons for reaching this determination are set out in a closed annexe to this Decision.

45. For reasons also set out in the closed annexe, we further conclude that the withheld information cannot be reliably disaggregated so as to allow some information to be provided to Ms Maurizi. We have, again, not reached this determination merely because the information is held by CTC but have instead carefully considered the content and context of the withheld information.

46. Having concluded that the s. 23(1) exemption applies to the withheld information, we have not gone on to consider whether the s. 24(1) exemption also applies since this was relied upon by the MPS in the alternative.

47. Because we have concluded that all of the withheld information is subject to the s. 23 absolute exemption, we have also not gone on to determine whether the exemptions set out in ss. 27 and 31(1)(a) &(b) also apply. This is because both are qualified exemptions and we are satisfied that any discussion of the public interest balancing test in the context of information already found to be subject to the s. 23 exemption would be artificial. Our preliminary view on these exemptions is that we see some force in DCS Southworth’s evidence in relation to both the mosaic effect and the more specific risks arising from disclosure to the prevention or detection of crime. However, we are less persuaded, on the evidence before us, that the risks described by DCS Southworth in relation to CTC’s strategic relationship with US counterparts met the threshold for reliance on s. 27.

Additional matters

48. The closed bundle, which includes an unredacted copy of DCS Southworth's witness statement, is subject to an Order under rule 14(6). We are satisfied that this Order should continue. The closed annexe to this Decision is also now subject to the same rule 14(6) Order.

49. In the normal way, a copy of this decision was sent to the Commissioner and the MPS for them to check the draft and make representations as to whether any parts of the open Decision should not be disclosed because to do so would reveal the content of the withheld information. The version of the Decision provided to the Appellant and promulgated generally will have been redacted and/or edited if necessary, in the light of such representations.

(Signed)

Judge Moira Macmillan

DATE: 27 January 2022

Promulgated: 4 February 2022

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ⁱ *Williams v IC and FCDO (EA/2019/0212); Wickham-Jones v IC & FCDO (EA/2019/0450); Lownie v IC & FCDO (EA/2020/0142)*